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In the Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and regulations involved	3
Statement	3
A. The Board representation proceeding	3
B. The court proceeding for enforcement of the subpenas	6
Reasons for granting the writ	8
Conclusion	17
Appendix A	18
Appendix B	29

CITATIONS

Cases:

Aircraft & Diesel Equipment Co. v. *Hirsch*, 331 U. S. 752	17
Avis Ford, Inc., et al.: Nos. 7–RC–2487–97	10
Cudahy Packing Co. v. *Holland*, 315 U. S. 357	7, 8, 13, 16
Fitzgerald v. *Douds*, 167 F. 2d 714	13
Fleming v. *Mohawk Co.*, 331 U. S. 111	8, 16
Guss v. *Utah Labor Board*, 353 U. S. 1	11
Hogue and Knott Supermarkets, 110 NLRB 543	4
Lowell Sun v. *Fleming*, 120 F. 2d 213	15
Madden v. *Brotherhood*, 147 F. 2d 439	13
Matter of David Goetz, No. 5 CA–467	11
Morgan v. *United States*, 298 U. S. 468	15
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	17
National Labor Relations Board v. *John S. Barnes Corp.*, 178 F. 2d 156	11
National Labor Relations Board, ex rel. Kohler Co. v. *Gunaca*, 135 F. Supp. 790, affirmed, 230 F. 2d 542, judgment vacated as moot, 353 U. S. 902	7
National Labor Relations Board v. *International Typographical Union*, 76 F. Supp. 895	7
Sa-Mor Quality Brass, Inc., No. 6–RC–694	10
Sterling Faucet Co., No. 6–RC–695	10
T. H. Rodgers Lumber Co., 117 NLRB No. 230	4

Cases—Continued
Page
Trade Winds Co, and *American Federation of Labor, etc.,* Nos. 10–CA–2692 and 10–CA–2781 10
United States v. *Sing Tuck,* 194 U. S. 161 17
Statutes:
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):
Section 4 (a) 15
Section 5 ..... 16, 29
Section 6 ..... 16, 29
Section 9 (c) 3
Section 9 (c) (1) 29
Section 9 (e) (1) 30
Section 11 (1) 6, 7, 8, 10, 16, 30
Section 11 (2) 6, 31
National Labor Relations Act, 1935 (49 Stat. 449), Section 11 (1) 4
Rules and Regulations of the National Labor Relations Board (29 C. F. R. 102.1 *et seq.* Supp. 1956):
Section 102.26 ..... 9, 32
Section 102.31 32
Section 102.57 (c) 5, 6, 9, 34
Section 102.58 (c) 5, 34
Rules National Labor Relations Board, Series 4, effective Sept. 4, 1946:
Section 203.51 (c) 14
Section 203.52 (c) 14
Administrative Procedure Act (5 U. S. C. A. § 1001, *et seq.*):
Section 1004 (c) 7
Section 1006 7
Section 1006 (b) 7
Section 1010 7
Miscellaneous:
Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 10, Part 5, 77th Cong., 1st Sess. (1941), pp. 18–19 14
Legislative History of the Labor-Management Relations Act, 1947 (Gov't Print. Off., 1948) 15
Legislative History of the National Labor Relations Act, 1935 (Gov't Print. Off., 1949) 12
Twenty-first Annual Report of the National Labor Relations Board (Gov't Print. Off., 1957), p. 163 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on April 2, 1957, denying the Board's request for enforcement of subpenas *duces tecum* directed to respondents.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 18–27) is reported at 243 F. 2d 427. The prior opinion of the District Court is set forth at R. 152–155.[1]

[1] "R" references are to the printed transcript of record used in the court below.

JURISDICTION

The judgment of the court below (Appendix A, p. 28, *infra*) was entered on April 2, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended, provides in relevant part that the "Board, or any member thereof," shall upon application of any party to a proceeding "forthwith issue to such party" subpenas requiring testimony or the production of evidence. The section further provides that, within five days after the service of a subpena on any person requiring the production of evidence, "such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to * * * any matter in question in such proceedings, or if * * * such subpena does not describe with sufficient particularity the evidence whose production is required." The Board, by administrative regulation, has provided that applications to revoke subpenas which are returnable at a hearing shall be filed with, and ruled on in the first instance, by the trial examiner (in unfair labor practice cases) and the hearing officer (in representation cases). The rulings of the trial examiner or hearing officer are in turn subject to direct review by the Board itself, should the party take a "special appeal" to the Board.

The questions presented are:

1. Whether the Board's regulation is valid under the statute.

2. If so, whether a party whose motion to revoke subpenas *duces tecum* has been denied by the hearing officer in a representation case can properly resist a Board suit to enforce the subpenas, where he has failed to exhaust his administrative remedy of a "special appeal" to the Board from the hearing officer's ruling.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth in Appendix B, *infra*, pp. 28–35.

STATEMENT

A. The Board representation proceeding

In November 1955, Local 1625, Retail Clerks International Association, AFL–CIO, filed a petition with the Board's Regional Director pursuant to Section 9 (c) of the Act. The petition sought a representation election among the employees of a retail jewelry store in Miami, Florida (R. 13–18). When the employer moved to dismiss the petition on the ground that its operations did not meet the Board's administrative jurisdictional yardsticks, the Regional Director, on application of the Chief Law Officer, issued, over the facsimile signature of Board Member Murdock, five subpenas *duces tecum* and one subpena *ad testificandum* (R. 29–35, 36–38, 62–66, 85–89, 109–113, 136–138, 139–140).

The subpenas *duces tecum* were directed to the store where the union was claiming representation rights, to three other jewelry stores allegedly part of the same intrastate chain, and to Oliver A. Jenkins, the president of these stores, each of which is a separate corporation.[*] The subpenas to the stores required each to produce, before a hearing officer at a scheduled hearing on the representation petition, books and records showing: (1) total purchases for the year 1955; (2) purchases and sales for or on behalf of other stores in the chain during this period; and (3) the store's shareholders of record and the amount of shares issued to each (R. 36–38, 62–66, 85–89, 109–113). The subpenas further provided that, in lieu of the books and records, each store could produce a written statement of a responsible official summarizing the information which would be shown by the records (*ibid.*).

The subpenas *duces tecum* to Oliver A. Jenkins (R. 136–138) required that he produce before the hearing officer books and records showing his stock ownership in the various stores in the alleged chain, or, in lieu of the books and records, a certified statement setting forth this information. In addi-

[*] Under its applicable jurisdictional standards, the Board will assert jurisdiction over a company operating a single retail store with no interstate sales only if its direct purchases from out-of-state are at least $1,000,000 annually, or its indirect out-of-state purchases are at least $2,000,000 annually. However, even if the store does not itself satisfy these requirements, jurisdiction will nevertheless be asserted over it if it is part of an intrastate chain, and the total direct or indirect inflow of all stores in the chain satisfy the aforementioned criteria. *Haight and Knott Supermarkets*, 110 NLRB 543, 544. See also, *T. H. Rodgers Lumber Co.*, 117 NLRB No. 230.

tion, a subpena *ad testificandum* was directed to Jenkins, requiring him to appear at the representation hearing and give testimony (R. 139–140).

The stores and Jenkins (hereafter called "respondents") filed with both the Board and the hearing officer petitions to revoke the subpenas *duces tecum* on the ground, among others, that they were burdensome and had not been properly issued (R. 39–41, 67–69, 90–92, 114–117). Jenkins also filed a petition to revoke the subpena *ad testificandum* (R. 131, 146, *infra*, p. 20). The Board, calling attention to the relevant portions of its rules,[3] refused to entertain

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[3] The Rules are set forth in full in Appendix B, pp. 31–35, *infra*. The particular provisions applicable to representation cases, in relevant part, are as follows:

Sec. 102.58 (*c*): * * * Any person subpoenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however*, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. * * * The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. * * *.

Sec. 102.57 (*c*): All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (c). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the

the petitions at this stage (*infra*, pp. 20–21). The hearing officer proceeded to rule on the petitions, denying them for the reason that they raised "no substantial issue as to the validity of said subpenas" (R. 45–46).

In denying the petitions to revoke, the hearing officer offered to change the place of hearing from Miami to Jacksonville, the main office of the chain of stores, if the respondents preferred to comply with the subpenas in the latter city (*ibid.*). Respondents did not request such transfer, nor did they attempt to appeal the hearing officer's ruling on their petitions to revoke to the Board, under Sec. 102.57 [illegible] of the Board's Rules (n. 3, *supra*). Instead, when the hearing was subsequently convened, they appeared through counsel and refused to comply with the subpenas (R. 11, 49). Pursuant to Section 11 (2) of the Act, the Board then instituted proceedings against each respondent in the district court for enforcement of its subpenas (R. 6, 55, 78, 101, 126).

B. The court proceedings for enforcement of the subpenas

The district court quashed the subpenas, holding that (R. 152–155): (1) the subpenas *duces tecum* were unreasonable and oppressive; and (2) all the subpenas were invalidly issued because Section 11 (1) of

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Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record. Requests to the Board for special permission to appeal from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

the Act provides that subpenas may only be issued "upon application of any party to [the] proceedings," and the Board's Regional Director is not a "party" to the representation proceeding.

The Board appealed to the court below, which held that enforcement of the subpenas *duces tecum* should have been denied because there had been no ruling by the Board on respondents' petitions to revoke. On the basis of the language of Section 11 (1) of the Act, which empowers only "the Board" to rule on petitions to revoke subpenas *duces tecum* while permitting the "Board or its duly authorized agents or agencies" to copy evidence, and the decision of this Court in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, the court below concluded that Congress intended to require the Board itself directly to rule on petitions to revoke subpenas *duces tecum* in representation cases[4] (*infra*, pp. 22–23). The court added that the provisions of the Board's rules, providing that petitions to revoke be

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[4] The court (*infra*, p. 24, n. 7) pointed out that it was not passing on the propriety of the delegation of revocation authority to a trial examiner in an unfair labor practice proceeding. The trial examiners who preside at unfair labor practice hearings, unlike the hearing officers presiding at representation hearings, are subject to, and appointed in conformity with, the requirements of the Administrative Procedure Act (5 U. S. C. A. §§ 1004 (c), 1006, 1010). Section 7 (b) of that Act (5 U. S. C. A. § 1006 (b)) provides an independent source of subpena authority for trial examiners. See *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.); *National Labor Relations Board, ex rel Kohler Co.* v. *Gunaca*, 135 F. Supp. 790 (E. D. Wis.), affirmed, 230 F. 2d 542 (C. A. 7), judgment vacated as moot, 353 U. S. 902.

passed on by the hearing officer subject to a right of "special appeal" to the Board, were a nullity for: "Under the Act, we think that the Board's jurisdiction to pass on petitions to revoke subpenas *duces tecum* is original, not appellate * * *." (*infra*, p. 24).

However, finding no provision in the Act for a petition to revoke a subpena *ad testificandum*, and concluding that the other grounds relied on by the district court were insubstantial, the court below held that the district court erred in declining to enforce the one subpena *ad testificandum* (*infra*, pp. 24–26).

REASONS FOR GRANTING THE WRIT

The holding of the court below has an important impact on the administration of the Act, it is erroneous, and it presents a question concerning the proper application of this Court's decisions in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Co.*, 331 U. S. 111.

1. Section 11 (1) of the Act provides that the "Board, or any member thereof, shall upon application of any party to [unfair labor practice or representation] proceedings, forthwith issue to such party subpenas." It further provides that, within five days after the service of a subpena *duces tecum*, the person served "may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion" the evidence sought is irrelevant or the subpena does not describe it with sufficient particularity. The Board has devised the following procedure (see Rules, *infra*, pp. 31–35) for implementing these provisions:

(1) blank subpenas bearing the seal of the Board and the facsimile signature of a Board member are supplied to the Board's regional offices and trial examiners; (2) upon the application of a proper party, the Regional Director (if the request occurs prior to the hearing), or the hearing officer or trial examiner (if the request occurs at the hearing), automatically issues the subpena, which is filled out and served by the requesting party; (3) where, as here, the subpena is returnable at a hearing, the initial ruling on any petition to revoke the subpena is made by the hearing officer or trial examiner (as the case may be).

Although the hearing officer or trial examiner is thus permitted to rule on petitions to revoke in the first instance, the Board in all cases retains the power of final decision. Thus, if a petition to revoke is denied by the hearing officer or the trial examiner, Secs. 102.26 and 102.57 (c) of the Board's Rules (*infra*, pp. 31–32, 33–34) permit the party aggrieved to apply to the Board "for special permission to appeal" from such ruling. This request must be in writing, "state the grounds relied on," and a copy thereof must be served "on each other party" to the proceeding. Upon the receipt of the request, together with any responses which may be filed by the other parties, the Board itself, in deciding whether or not to grant the appeal, will review the propriety of the hearing official's ruling. Should the Board conclude that the hearing official acted reasonably, it will deny the request for a

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[8] Trial examiners hear unfair labor practice cases, whereas hearing officers generally hear representation cases. See n. 4, *supra*, p. 7.

special appeal.[6] On the other hand, should the Board conclude that the hearing official erred, it will grant the appeal and reverse or otherwise modify his ruling on the petition to revoke.[7]

Accordingly, the Board has not delegated the power which the Section 11 (1) of the Act confers upon it to rule on petitions to revoke, but has merely deferred the exercise thereof until it has first obtained the benefit of an initial decision by the official conducting the hearing.

2. In holding that the Board's power in respect to petitions to revoke subpenas is "original, not appellate", and that it cannot utilize subordinates in this preliminary fashion, the court below unsettles a practice which the Board has followed for almost 10 years under the amended Act, and, as shown *infra*, even under the Wagner Act. Moreover, the court's holding imposes upon the Board a serious burden.

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[6] For example, requests for special appeal were denied by the Board in *Avis Ford, Inc., et al.*, Nos. 7-RC-2487—97, etc., order dated November 5, 1954, on the ground that there had been no showing that the information sought to be elicited by the subpenas was not relevant to the matter under investigation. In *Sa-Mor Quality Brass, Inc.*, and *United Association of Journeymen and Apprentices, etc.*, No. 6-RC-694, and *Sterling Faucet Company* and *United Association of Journeymen and Apprentices, etc.*, No. 6-RC-695, a request for a special appeal to the Board was denied on March 11, 1952, "without prejudice to the right of the Respondents again to present the issue to the Board pursuant to provisions of the Rules and Regulations subsequent to issuance of an Intermediate Report by the Trial Examiner."

[7] For example, in *Trade Winds Company, Inc.*, and *American Federation of Labor-Congress of Industrial Organizations*, Nos. 10-CA-2692 and 10-CA-2781, the Board, by order dated February 19, 1957, having granted the request for special per-

During the fiscal year ending June 30, 1956, the Board closed 8,070 representation cases and 5,619 unfair labor practice cases, issuing formal decisions in 1,751 of the representation cases and 400 of the unfair labor practice cases.[3] During a comparable period, a total of 855 subpenas were issued in representation cases, of which 318 were subpenas *duces tecum*, and the number issued in unfair labor practice cases was about as large. Under the present procedure, the Board is required to interrupt its main decisional process for a consideration of subpoena questions in only a handful of cases, for the parties are generally satisfied with the hearing officials' rulings on petitions to revoke and thus do not undertake a "special appeal" to the Board. Under the view of the court below, however, every petition to revoke would go to the Board, and without the benefit of any preliminary screening by the hearing official. This would absorb time which the Board, already having a substantial backlog,[4] could better spend on other matters.[5] Indeed, as the Seventh Circuit pointed out in *National Labor Relations Board* v. *John S. Barnes*

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mission to appeal, reversed the ruling of the Trial Examiner and revoked the subpena on the ground that an insufficient showing had been made that the documents elicited by the subpena were material or relevant at the time. See also, *In the Matter of David Goetz, etc.*, and *Textile Workers Union of America, CIO*, No. 5-CA-467, order dated April 22, 1952.

[3] *Twenty-first Annual Report* of the National Labor Relations Board, (Gov't Print. Off., 1957), pp. 163, 165.

[4] At the close of the fiscal year ending June 30, 1956, there was a backlog of 1,444 representation cases and 2,318 unfair labor practice cases. *Twenty-first Annual Report*, *op. cit.*, p. 163. Cf. *Guss* v. *Utah Labor Board*, 353 U. S. 1, 11-12.

Corp., 178 F. 2d 156, 160: If "the Board must then, as a Board, pass upon every petition for the revocation of any subpena, it would be physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purposes of the Act."

Moreover, hearings under the Act are conducted throughout the United States and its Territories. Requiring the Board to pass on every petition to revoke would interrupt and delay the hearing before the hearing official, for where, as is usually the case, the subpena pertains to the central issue in the proceedings, there would be no alternative but to adjourn the hearing for the period of at least several days that may be required to prepare and submit a petition to the Board in Washington and obtain its ruling thereon. A delay of this nature is particularly serious in representation cases which constitute the bulk of the Board's caseload, for, as Congress has emphasized: "When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees * * * the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on * * * or else is forced to call a strike to achieve recognition by its own economic power."[10]

[10] Leg. Hist. of the National Labor Relations Act, 1935 (Gov't Print., 1949), p. 3053. Congress was so concerned about avoiding delay in representation cases, that, under both the original and amended Acts, it rejected proposals which would

Where a petition to revoke is brought in good faith and not merely as a dilatory tactic, the petitioner, if satisfied with the ruling of the hearing official need not, under the Board's rules, pursue the matter by special appeal to the Board. As noted above, under present practice such appeals are rarely taken. If, however, every petition to revoke had to be passed upon by the Board in the first instance, not only would the Board be required to review petitions which could otherwise ordinarily be disposed of in a manner satisfactory to all parties by a preliminary screening, but an increase in the number of petitions designed solely to delay might well be anticipated as the length of time required to dispose of such petitions increased.

3. Nor could the difficulties just enumerated be alleviated, as the court below suggested (pp. 22–23, *infra*), by greater use of the Board's power to copy evidence. As this Court noted in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 364, discussed *infra*, the power to copy "is, in effect, a power of inspection at the employer's place of business *to be exercised only on his consent*". (emphasis added). Since the Board generally utilizes subpenas only when the respondent has failed to make the desired information available voluntarily, it is clear that the Board's power to copy evidence is not a satisfactory substitute for the subpena power.

Furthermore, the same distinction between the power to copy and the power to subpena existed in

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have permitted direct judicial review of Board representation determinations. See *Madden* v. *Brotherhood*, 147 F. 2d 439 (C. A. 4); *Fitzgerald* v. *Douds*, 167 F. 2d 714 (C. A. 2).

Section 11 (1) of the Wagner Act, and thereunder, as now, the Board's regulations provided for the exercise of the subpena power by the hearing official, subject to a "special appeal" to the Board itself."

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[11] Thus Section 11 (1) of the Wagner Act, in relevant part (49 Stat. 449), provided that:

> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. * * *

Implementing this, Section 203.52 (c) of the Board's Rules, Series 4, effective September 11, 1946, provided, in relevant part, that:

> Prior to the hearing, application for subpenas may be filed in writing by any party, including Board agents, with the Regional Director. The Regional Director may grant or deny the application, or may refer it to the hearing officer who may thereafter grant or deny the application. During the hearing, applications for subpenas shall be made in writing to the hearing officer, who may grant or deny the application. If any application is denied the denial shall be accompanied by a simple statement of procedural or other grounds. Such applications may be made *ex parte*, shall be timely, and shall specify the name of the witness and show the general relevance and reasonable scope of the evidence sought; and, if calling for documents, shall specify the same with such particularity as will enable them to be identified for the purposes of production. * * *

Sec. 203.51 (c), in turn, provided for "special appeals" to the Board from these rulings. See also, *Attorney General's Committee on Administrative Procedure*, S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., pp. 18–19.

Yet, in amending the Act, Congress indicated that it was making no change in the subpena procedures of the Wagner Act, except for making it a two-step rather than a one-step operation; *i. e.*, making the issuance of the subpena automatic and transferring the discretion otherwise present at this stage to a subsequent, petition to revoke, stage.[12]

4. The court below's reliance on *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, is misplaced. *Cudahy* involved a true delegation problem in that the Wage and Hour Administrator, without reserving any power of review to himself, authorized regional directors to sign and issue subpenas *duces tecum*.[13] Here, on the other hand, the Board itself has retained the power of final decision. Since a complete and unreserved delegation to a subordinate is quite a different thing from merely authorizing the subordinate to make an initial ruling which is subject to final review by the agency heads,[14] the holding in *Cudahy* that the procedure there involved was unauthorized by the applicable statute is clearly not apposite here.

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[12] Leg. Hist. of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948), pp. 562, 1543.

[13] See *Lowell Sun Co.* v. *Fleming*, 120 F. 2d 213, 215, fn. 1 (C. A. 1).

[14] Although the "one who decides must hear," this "necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department", *Morgan* v. *United States*, 298 U. S. 468, 481. See also, Section 4 (a) of the Act, which authorizes the Board to "appoint * * * an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties."

But, even if the situation here were viewed as presenting a "*Cudahy*-type problem," *Cudahy* is inapposite for the further reason that the factors which led this Court, in *Fleming* v. *Mohawk*, 331 U. S. 111, to decline to apply *Cudahy* to the Emergency Price Control Act also hold true for the National Labor Relations Act.[15]

5. Assuming the validity of the Board's rules, providing for an initial ruling on petitions to revoke subpenas by the hearing official with a right of "special appeal" to the Board, the Board was entitled to summary enforcement of the subpenas *duces tecum*. Respondents, by failing to take a "special appeal"

[15] In *Mohawk*, the Price Administrator had delegated the function of signing and issuing subpenas to regional administrators and district directors, notwithstanding that Section 202 (b) of the Emergency Price Control Act, like Section 11 (1) of the National Labor Relations Act, conferred the subpena power only on the agency head. In sustaining the delegation notwithstanding the literal language of the subpena provision itself, this Court relied on Section 201 (a) and (b) of the Emergency Price Control Act, which empowered the Administrator to perform his duties through his authorized representatives; Section 201 (d), which granted him broad rule-making power; and the fact that the Administrator's various functions were so numerous that he could hardly be expected to exercise his personal discretion in respect to each subpena (331 U. S. at 120–123).

These same considerations apply to the National Labor Relations Act. Section 5 of the Act authorizes the Board "by such agents or agencies as it may designate, [to] prosecute any inquiry necessary to its functions in any part of the United States"; Section 6 confers upon the Board a broad rule-making power; and, as we have shown pp. 11–13, *supra*, requiring the Board to pass on every petition to revoke a subpena in a representation case is a task of such proportions that Congress could not have intended this result.

to the Board from the hearing officer's denial of their petition to revoke, failed to exhaust their administrative remedies, and thus are barred from asserting their defenses in the enforcement suit. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752; *United States* v. *Sing Tuck*, 194 U. S. 161.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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JUNE 1957.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16180

NATIONAL LABOR RELATIONS BOARD, APPELLANT

VERSUS

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Florida

(April 2, 1957)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

RIVES, Circuit Judge: The National Labor Relations Board applied to the district court for orders to enforce certain subpoenas duces tecum and ad testificandum which the Board claimed to have issued pursuant to Section 11 (1) of the National Labor Relations Act.[1] The jurisdiction of the district court

[1] § 161. *Investigatory powers of Board.*

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

"Documentary evidence summoning witnesses and taking testimony

was based on Section 11 (2) of the Act.[2] The district court "quashed" the subpoenas upon the grounds (1) that they were unreasonable, burdensome, and oppressive and (2) that they were not issued upon

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." Title 29, U. S. C. A.

[2] "Court aid in compelling production of evidence and attendance of witnesses

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." Title 29, U. S. C. A. § 161 (2).

application of a "party" to the proceedings before the Board. It failed to pass upon a third ground to the effect that the applications for enforcement were premature because the Board had not itself, under Section 11 (1) [footnote (1), *supra*], considered and ruled on petitions to revoke each of said subpoenas. If the third ground is good, then there has been no such final administrative action as is prerequisite to judicial review or enforcement,[3] and, as a matter of law, there has been no contumacy or refusal to obey a subpoena." Section 11 (2) [Footnote (2), *supra*]. At the threshold, therefore, we give consideration to the third ground.

Each and all of the respondents, appellees, had filed with the National Labor Relations Board petitions to revoke the subpoenas together with requests for permission to file briefs and present oral arguments in support of their petitions. The Board, calling attention to Section 102.58 (c) of its Rules, 29 C. F. R., § 102.58 (c),[4] refused to entertain the peti-

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[3] See 42 Am. Jur., Public Administrative Law, Sec. 194.

[4] "(c) Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however*, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing offi-

tions. The hearing officer undertook to deny the petitions to revoke. The respondents did not request "special permission of the Board" to appeal.[5]

One of the subpenas directed to appellee Oliver Jenkins was a subpoena ad testificandum, as to which there appears no provision in the Act for a petition to revoke [see Section 11 (1), Footnote (1), *supra*], and hence the application for its enforcement was not premature on that ground.

All of the other subpoenas were subpoenas duces tecum and the petitions to revoke, while not couched in the language of the statute, sufficiently raised the point of relevancy, that is, that "the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceedings." Section 11 (1), Footnote (1), *supra*. As to the subpoenas duces tecum, then, the primary question is whether the Act empowers the Board to

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cer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them." 29 C. F. R. § 102.58 (c).

[5] "Unless expressly authorized by these Rules and Regulations, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record." Section 102.57 (c) of the Board's Rules, 29 C. F. R. 102.57 (c).

delegate to hearing officers the power to pass upon such petitions to revoke.

We think that that question is answered in the negative by the carefully worded provisions of Section 11 (1) of the Act, Footnote (1), *supra*. There the gradations in authority are explicitly delimited. "The Board, or its duly authorized agents or agencies" are given access to and the right to copy evidence. Upon the application of any party, "the Board, or any member thereof" is required "forthwith" to *issue* subpoenas. At that stage there is no discretion. However, any person served with a subpoena duces tecum "may petition *the Board* to revoke, and *the Board* shall revoke such subpoena if in *its* opinion" etc. (Emphasis supplied.)

It may be, as stated in *N. L. R. B.* v. *Pesante*, S. D. Calif., 119 F. Supp. 444, 450, 451, 452, that the legislative history of the Act further supports such construction. We think, however, that the language itself of Section 11 (1) of the Act is plain, and that a different construction is not authorized by any other part of the Act nor by the Act as a whole.

The Seventh Circuit's remarks about petitions to revoke in *N. L. R. B.* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160, were necessarily dicta as it does not appear that any such petition was filed in that case.

An administrative remedy under which any person served with a subpoena duces tecum may seek protection from the Board itself to make certain that the evidence is described with sufficient particularity and is relevant to the inquiry should not, we believe, prove unduly burdensome to the Board. If it does the remedy lies with Congress, not with the courts. In most cases, methods less burdensome to the respondents than subpoenas duces tecum are available to the Board such as the right of "the Board, or its duly authorized

agents or agencies" to have access to and to copy any evidence, supplemented if need be by the use of subpoenas ad testificandum, required to be issued upon the application of any party.

The reasoning of the Supreme Court in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363, is highly persuasive that the Board has no authority to delegate its power to revoke a subpoena:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency." 315 U. S. at pp. 363–364.

Nothing in the later case of *Fleming* v. *Mohawk Co.*, 331 U. S. 111, seems to us to lead toward a different construction of the Act now under consideration.[6]

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[6] See the discussion of the *Mohawk* Case in *N. L. R. B.* v. *Pesante*, S. D. Calif., 119 F. Supp. 444, 454, 455.

Under the Act, we think that the Board's jurisdiction to pass on petitions to revoke subpoenas duces tecum is original, not appellate, that the denial of the petitions by the hearing officer was a mere nullity, and that the respondents were not required to request "special permission of the Board" to appeal. The petitions to revoke were addressed to and filed with the Board itself, and until the Board has passed upon the petitions one way or the other, there is no "contumacy or refusal to obey a subpoena" [see 11 (2) of the Act, Footnote (2), *supra*], and the matter of the enforcement of the subpoenas is not ripe for consideration of the court. We hold, therefore, that the district court should have declined to rule upon the enforcement of the subpoenas duces tecum.[7]

The subpoena ad testificandum directed to appellee Oliver Jenkins is not claimed to be oppressive or burdensome.[8] Was it properly quashed because not issued upon the application of a "party" to the proceedings before the Board? The subpoena was sought in a representation proceeding brought under Section

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[7] It should be noted that we are not passing upon the authority as to subpoenas duces tecum of a trial examiner or hearing officer in an unfair labor practice case. Representation proceedings, as distinguished from unfair labor practice cases, are somewhat removed from the purview of the Administrative Procedure Act, 5 U. S. C. A. 1001, et seq. Section 1004 specifically excepts agency hearings involving "the certifications of employee representatives" from those provisions applicable to cases of "adjudication," including, we think, the provisions of Section 1005 (c) dealing with agency subpoenas. Compare *N. L. R. B.* v. *Anchor Rome Mills*, 5th Cir., 197 F. 2d 447.

[8] In any event, courts can usually remove the oppression or burden without quashing the entire subpoena. *N. L. R. B.* v. *Anchor Rome Mills*, 5th Cir., 197 F. 2d 447, 450; *Jackson Packing Co.* v. *N. L. R. B.*, 5th Cir., 204 F. 2d 842, 844.

9 (c) of the Act, 29 U. S. C. A. 159 (c) (1).[9] The labor organization and the employer are usually adversely interested in such proceeding. The proceeding is, however, an "investigation."[10] "The employer is, in theory at least, not much concerned, since the employees are to choose their representative unhindered." *N. L. R. B.* v. *Whittier Mills Co.*, 5th Cir., 111 F. 2d 474, 478. The Board is charged with the responsibility of conducting the representation investigation, and the express terms of the statute authorize the Board to use subpoenas in aid of its investiga-

[9] "(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U. S. C. A. § 159 (c) (1).

[10] *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706; *N. L. R. B.* v. *National Mineral Co.*, 7th Cir., 134 F. 2d 424, 426.

tions." Section 102.8 of the Board's Rules and Regulations, 29 C. F. R., Sec. 102.8, 1956 Supp., defines "party" as including "the regional director in whose region the proceeding is pending," [12] though we do not consider that important to a decision of the present question. The language of the statute authorizing the use of subpoenas in investigations, while requiring their issuance upon the application of any "party," may appear to be conflicting, but the purpose is clear.

Contrary to the district court in *N. L. R. B.* v. *Pesante, supra,* 119 F. Supp. at p. 457, we can see no objection to the Board member furnishing the subpoenas under his signature to the Regional Director to be used by the Director in such investigations as required. We think that the district court erred in declining to enforce the subpoena ad testificandum directed to Oliver Jenkins, and in not declining to rule upon the enforcement of the subpoenas duces tecum. One-sixth of the cost of appeal is taxed against the appellees, and the other five-sixths against the appellant. The judgment is reversed and the cause remanded for

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[11] Section 11 of the Act, 29 U. S. C. A. 161, Footnote 1, supra. *N. L. R. B.* v. *Anchor Rome Mills*, 5th Cir., 197 F. 2d 447, 449.

[12] "§ 102.8 *Party.* The term 'party' as used in this part shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act: but nothing in this part shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only." 29 C. F. R., 1956 Supp.

further proceedings not inconsistent with this opinion.
Reversed and Remanded.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16180

NATIONAL LABOR RELATIONS BOARD, APPELLANT,

VERSUS

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL., APPELLEES.

Upon Motion for Modification of Opinion

(May 6, 1957)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

PER CURIAM:

Upon motion of the appellant, the following sentence is deleted from the last paragraph of the opinion: "One-sixth of the cost of appeal is taxed against the appellees, and the other five-sixths against the appellant." 28 U. S. C. A. 2412 (a); 29 U. S. C. A. 153 (a); Ewing v. Gardner, 341 U S. 321; United States v. Patterson, 5th Cir., 206 F. 2d 345, 348; Walling v. Norfolk Southern Ry. Co., 4th Cir., 162 F. 2d 95, 96; Compare N. L. R. B. v. Red Arrow Freight Lines, 5th Cir., 193 F. 2d 979, 981; N. L. R. B. v. Remington Rand, Inc., 2nd Cir., 130 F. 2d 919, 937.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16180

NATIONAL LABOR RELATIONS BOARD

VERSUS

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL.

JUDGMENT

Extract from the Minutes of April 2, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellant, National Labor Relations Board, be condemned to pay five-sixths of the costs of this cause in this Court; and that the appellees, Duval Jewelry Company of Miami, Inc., and others, be condemned, in solido, to pay one-sixth of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court.

APPENDIX "B"

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

SEC. 9 (c) (1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * *

* * * * *

SEC. 9. (c) (1). Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such

proceedings, forthwith issue to such party subpenas, requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if, in its opinion, the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD

(29 C. F. R. 102.1, *et seq.*, Supp. 1956)

Subpart B—Procedure under Section 10 (a) to 10 (i) of the Act for the Prevention of Unfair Labor Practices

* * * * *

SEC. 102.26 *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.*—All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the rules and regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

* * * * *

SEC. 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.*—(*a*) Any member of the Board shall, on the written appli-

cation of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpenas may be made *ex parte*. The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(*b*) Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpoenas shall be served upon the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be,

shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling. * * *

Subpart C—Procedure under Section 9 (c) of the Act for the Determination of Questions Concerning Representation of Employees

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SEC. 102.57 *Motions; interventions.* * * *

(c) All motions, rulings and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (e). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record. Requests to the Board for special permission to appeal from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party. * * *

SEC. 102.58 *Introduction of evidence; rights of parties at hearing; subpenas.* * * *

(c) Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made *ex parte*. The regional director

or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer. *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

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